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**In the
Supreme Court of the United States.**

OCTOBER TERM, 1946.

No.

AIDEN LASSELL RIPLEY, PETITIONER,

v.

**FINDLAY GALLERIES, INC., A CORPORATION, AND GOES
LITHOGRAPHING CO., A CORPORATION, RESPONDENTS,**

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your petitioner, Aiden Lassell Ripley, plaintiff, respectfully prays for a Writ of Certiorari to the Circuit Court of Appeals of the Seventh Circuit to review a judgment of that Court entered July 9, 1946, denying plaintiff's petition for rehearing.

**SUMMARY AND SHORT STATEMENT OF THE MATTER
INVOLVED.**

This action was brought in the United States District Court for the Northern District of Illinois, Eastern Division, to enjoin, and recover damages for, infringement of copyright, both at common law and under the Copyright Laws of the United States. The subject of the copyright was an original painting and work of art painted in 1941 by the petitioner Ripley, an artist, and entitled "Three

Grouse in Snow". Ripley is a resident and citizen of the Commonwealth of Massachusetts and the defendant Findlay Galleries is a Chicago art dealer and the defendant Goes Lithographing Company is a Chicago lithographer. Both defendants are corporations of the State of Illinois. Jurisdiction of the Court was based on the diversity of citizenship of the parties, the requisite amount in controversy, and on the Copyright Laws of the United States, and is not disputed.

The essential facts, *found by the District Court and fully supported by the record, are as follows:*

Petitioner Ripley on January 6, 1942, after personal solicitation by W. C. Findlay, Jr., President of defendant Findlay Galleries, consigned eleven of his paintings to Findlay Galleries for sale, one of the paintings being the water-color "Three Grouse in Snow" which was authorized to be sold by the dealer for \$300 (less 1/3 commission to the dealer) (Finding No. 6, R. p. 236). Nothing was said at the time as to the reproduction rights to these paintings, but petitioner consigned them to the Galleries under *the long settled custom and understanding of the trade, that the dealer, as the artist's agent, is authorized to sell only the original painting, that the right to reproduce it is separate and distinct therefrom, and that the dealer has no authority to sell the reproduction rights thereto without the express permission of the artist and by special arrangement with him* (Finding No. 7, R. pp. 236-7). (Plaintiff's ample evidence establishing this custom was entirely uncontradicted by defendants). Both W. C. Findlay, Jr., president of Findlay Galleries, and Arthur A. Goes, president of Goes Lithographing Company, knew of this custom of the trade in April 1942 (Finding No. 8, R. p. 237). On March 14, 1942, defendant Findlay Galleries wrote plaintiff (Plf's Exh. 5, R. p. 173) that it had a client, an important lithographer *

* Not Goes Lithographing Company—Goes Q. 91-94, R. p. 39.

who had done *calendars* for the Milwaukee Journal, and who that year was going to use a *calendar* of (Ripley's) type of subject, that the *calendar* was really a very artistic thing, and was writing to see

" . . . if it would be agreeable to use any of your watercolors or etchings" (and) "if you might be interested in having us sell any of your watercolors for reproductions".

Plaintiff replied March 16, 1942 (Plf's Exh. 6, R. p. 175):

"I have no objection to selling one of my pictures for reproduction, especially if it is well reproduced . . . I would rather sell your client a watercolor and if he would rather have me do something especially for him I think I could do it. *In this case I should ask a slightly higher price.*"**

A few days later, on March 24, 1942, another dealer, Sessler, in Philadelphia, wrote petitioner, specifically inquiring if Ripley was willing to have his watercolors sold *for reproduction in color prints* (Plf's Exh. 42-A, R. p. 219). To this letter petitioner replied April 2, 1942 (Plf's Exh. 42-B, R. pp. 219-20):

" . . . I don't believe I want to sell copyrights of my pictures to anyone and as a matter of fact I have already turned down several similar offers to make *prints* in the past. I have nothing against an occasional reproduction for books, *calendars* or advertising and from your first letter thought your client might want something for these purposes. I am sorry to turn this down . . . "

On April 6, 1942, W. C. Findlay, Jr. surreptitiously and without the knowledge of petitioner, *personally* negotiated delivery of Ripley's painting "Three Grouse in Snow" to

** Italics ours throughout.

defendant Goes Lithographing Company to permit its reproduction by the latter *in color prints*, in a transaction purporting to be an outright sale of the painting for \$300, but which was in fact and effect merely a sale of the reproduction rights in the painting for \$150 because defendant Goes had the right to return the painting when reproduction was completed and to receive \$150 credit against other paintings to be delivered by Findlay (Finding Nos. 12-16, R. pp. 238-9). Even Goes' own written memorandum of the transaction states (Plf's Exh. 6-A, R. p. 177, Finding No. 13, R. p. 238):

"Findlay will sell Ripley @ 150.00 . . . "

whereas the authorized *selling price of the painting* was \$300. The Goes Company reproduced petitioner's painting extensively in lithograph prints which it widely sold, returned the painting to Findlay in August 1942, and received its \$150 credit therefor (Findings Nos. 14-15, R. p. 238). *Defendant Findlay Galleries did not report to petitioner the transaction with the Goes Company, either as a sale of his painting, or as a sale of the reproduction rights therein, and has never paid to petitioner the \$150 received from Goes for permitting reproduction of the painting* (Finding No. 17, R. p. 239). *Findlay Galleries simply pocketed this money.* Thereafter, in reply to petitioner's repeated requests for the return of his painting, W. C. Findlay, Jr. *himself* concealed from petitioner his transaction with the Goes Company and until confronted with the reproductions *denied all knowledge of where the painting was* (Finding Nos. 18-22, R. pp. 239-240). On September 2, 1942, petitioner wrote W. C. Findlay, Jr. expressly stating (Finding No. 23, R. p. 240):

" . . . that I do not want to sell any of my things to anyone who might intend to make *color prints* of them. I have turned down several offers of this sort and ask

your cooperation in preventing anyone from buying anything of mine for this purpose."

On November 17, 1942 *W. C. Findlay, Jr.*—not defendant Findlay Galleries—then bought the painting "Three Grouse in Snow" from petitioner Ripley, for himself paying therefor during the next eight months with four *personal* checks of \$50 each until \$200 was paid (the purchase price of \$300 less 1/3 commission) (Findings Nos. 24, 25, R. pp. 240-1).

On September 15, 1943, petitioner Ripley for the first time learned of the reproduction of his painting when he saw prints of it in a Boston department store and demanded explanation from *W. C. Findlay, Jr.* The latter, in reply, attempted to place the blame for the reproduction on his salesman Priestly, although Findlay *himself* had negotiated the transaction with Goes (Findings, Nos. 25-27, R. pp. 241-2).

On September 25, 1943, petitioner registered his copyright in his painting "Three Grouse in Snow" in the Copyright Office in Washington, D. C. as an *unpublished work of art** (pursuant to the Copyright Act, Title 17, U.S.C. Sec. 11), and received therefor Certificate Class G UNP, No. 42234. Shortly thereafter petitioner brought this suit against defendants for infringement of common law and statutory copyright (Finding No. 28, R. p. 242; Complaint, R. pp. 2-5).

As the facts show, this case is one in which an unscrupulous art dealer and lithographer conspired to defraud an artist of the reproduction rights to one of his paintings, where the dealer, surreptitiously delivered a painting to the lithographer for reproduction for \$150 net, although the painting had been entrusted to the dealer for sale for \$300, concealed the transaction from his artist principal, lied to him when

* Petitioner could not register his copyright in the painting as a *published* work of art, because the Goes' reproductions had not borne the notice of copyright required by Title 17, U.S.C. Sec. 9.

asked to return the painting, pocketed the money received from his breach of trust, which properly belonged to his principal—and which conduct, under the Illinois Criminal Code, Secs. 74–75, constitutes the crime of Embezzlement by Agent.

On these simple facts the District Court (Judge Philip L. Sullivan) granted petitioner the relief sought (Interlocutory Judgment, R. pp. 246–7). But the Court of Appeals for the Seventh Circuit reversed the District Court, and dismissed the plaintiff's action as “without merit”.

The facts stated above are the facts of the case—*found by the District Court and fully supported by the evidence*. The facts stated by the Court of Appeals in its Opinion (R. pp. 275–284) differ from the foregoing in several material respects, particularly as to W. C. Findlay, Jr.'s *personal* negotiation of the Goes' transaction*, but in such respects the Court's statement is not supported by the record, and is even *contrary* to the record. (Its many material errors of fact were called to the Court's attention in a Petition for Rehearing (R. pp. 285), but the petition was denied without opinion.)

The Court of Appeals specifically held that Findlay's delivery of the painting to the Goes Company for reproduction purposes (for which Findlay received \$150, although the authorized selling price of the painting was \$300) was an outright sale of the painting to the Goes Company—disregarding the finding of the District Court that the transaction was in effect and in fact merely a sale of the reproduction rights for \$150 (Findings Nos. 13, 16, R. pp. 238–9). The Court then held that by his letter of March 16, 1942 (Plf's Exh. 6, R. p. 175) petitioner had *expressly authorized* defendant Findlay Galleries to sell any of his paintings for reproduction *in color prints*. The Court then held that W.

* This was expressly admitted by W. C. Findlay, Jr. (R. p. 121, XQs. 53–54, 58).

C. Findlay, Jr.'s later purchase of the painting for himself from petitioner, and his payment of \$200 to petitioner for the painting, "extinguished the obligation to plaintiff".

The Court said expressly:

"If title passed (to Goes Company) as we believe, then only an obligation remained for Findlay to remit to plaintiff the sum of \$200.00, the net proceeds of the sale. When Findlay did subsequently pay the sum of \$200.00 to plaintiff, although supposedly on another basis, this extinguished the obligation to plaintiff."

The Court further held that the Goes Company's reproduction of his painting by his "express authority" prevented petitioner from registering his copyright in the painting as an "unpublished work of art" pursuant to the Copyright Act, Title 17, U.S.C. Sec. 11, and that the copyright registration secured by plaintiff was thence invalid.

1. The decision of the Court of Appeals is contrary to the elementary and fundamental principles of the common law relating to both common law and statutory copyright, as expressed in the following decisions of this Court, and of many other courts, from very early times, and even carried into the express language of the Copyright Act of 1909, (Title 17, U.S.C. Sec. 41) *that an artist at common law and under the Copyright Act possesses the exclusive right to reproduce any work of art he creates, that this right (i.e., the copyright) is a valuable property right, and is separate and distinct from the work of art itself, that both can be separately conveyed, and that possession of, or transfer of title to, the work of art does not carry with it the copyright, unless such right is clearly granted:*

The Copyright Act (Title 17, U.S. Sec. 41).

Stephens v. Cady, 14 How. 528 at 530-531, 55 U.S. 528 (1852).

Stevens v. Gladding, 17 How. 447, at 453, 58 U.S. 447 (1854).

American Tobacco Co. v. Werckmeister, 207 U.S. 284 at 290-291, 293, 298-299, (1907).

Werckmeister v. American Lithographic Co., 134 F. 321 at 323-4, (CCA 2, 1904).

Werckmeister v. American Lithographic Co., 142 Fed. 827 at 830-831; (CCSDNY 1905) (Affirmed 148 F. 1022, (CCA 2, 1906)).

Werckmeister v. Springer Lithographing Co., 63 F. 808 at 812, (CCSDNY 1894).

Millar v. Taylor, 4 Burrows, 2303 at 2396 (King's Bench, 1769).

Donaldson v. Beckett, 4 Burr. 2408, (House of Lords 1774).

Crowe v. Aiken, 6 Fed. Cas. 904 at 905-6, No. 3441 (CCND Ill. 1870).

Buck v. Swanson, 33 F. Supp. 377 at 387 (D.C.D. Neb. 1939, 3-Judge Court).

The Illinois authorities relating to common law copyright do not differ from the Federal authorities above listed. There is thus no question here of the Federal Court in a diversity of citizenship case being obligated to follow differing State court decisions, as in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937).

It follows, of course, the copyright being separate and distinct from the work of art, that Findlay Galleries has defrauded petitioner of the proceeds of the sale of his painting for reproduction purposes by pocketing them, and by failing to report the transaction to petitioner.

2. The Court's decision is also contrary to the elementary and fundamental principles of Agency at common law and under Illinois law that an agent is a fiduciary, owing a duty to give his principal information relative to affairs entrusted to him, and to account for profits arising out of his employment, as represented by the following authorities:

Chicago Title & Trust Co. v. Schwartz, 339 Ill. 184 at 193-4, 171 N.E. 169 (1930).

Rieger v. Brandt, 329 Ill. 21 at 27-28, 160 N.E. 130 (1928).

Stemm v. Gavin, 255 Ill. 480 at 486.

Glover v. Layton, 145 Ill. 92 at 97, 34 N.E. 53 (1893).

Restatement of Agency, Secs. 13, 381, 382, 383, 388.

3. The Court's decision has in effect, extended the doctrine of *Pushman v. New York Graphic Society*, 287 N.Y. 302, 39 N.E. (2d) 249 (New York Court of Appeals, 1942) to the protection of a faithless dealer and conspiring lithographer, to whom it has no applicability. That decision involving a bona fide purchaser of a painting without notice of limitations on the dealer's authority, holds in effect that, as an *absolute rule of law*, unless there is an express reservation of reproduction rights by the artist, they pass to the purchaser on the sale of the painting. That case, defendants' principal reliance in the Courts below, is clearly distinguishable on its facts, and very plainly should not be extended to enable a dealer-agent to defraud his artist-principal of his reproduction rights. The Court of Appeals has in effect done so, however, in holding that the Findlay-Goes transaction was an outright sale of petitioner's painting, and that W. C. Findlay Jr.'s purchase of the painting from petitioner for himself "extinguished the obligation to plaintiff". Findlay Jr.'s subsequent purchase of the painting for himself, at a time when petitioner knew nothing of the Goes transaction, was very plainly an attempt to bring himself within the rule of the Pushman Case. The Pushman Case itself is contrary to the elementary and fundamental principles of the common law relating to both common law and statutory copyrights stated above under Point 1, and was based on a rule stated in *Parton v. Prang*, 18 Fed. Cas. 1273, No. 10,784 (CCD Mass. 1874), which the New York Court did not realize had been overruled by this Court in *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907). But the extension of the doctrine of the *Pushman Case* in

effect by the Court of Appeals herein to protect a defrauding dealer and lithographer is not only unnecessary, but most inequitable, and likewise contrary to the fundamental principles of law relating to both Copyright and Agency stated above.

The decision of the Court of Appeals herein allows any reproducer to bring himself within the rule of the *Pushman Case* merely by going through the *form* of buying a painting outright from the dealer at its stipulated price, whereas by having an understanding with the dealer that he can return the painting to the dealer when reproduction is completed, and receive a credit against other paintings for the value of the painting in excess of the value of its reproduction rights, he in effect and in reality is buying only the reproduction rights. And the decision allows any dealer to bring himself within the rule of the *Pushman Case* merely by buying the painting *himself*, and to then retain for himself all proceeds derived from permitting reproduction of the painting!

QUESTIONS RAISED BY THE CASE.

The case, therefore, raises the following questions:

1. To whom do the reproduction rights (i.e. the copyright) and the proceeds thereof, to a painting belong, either at common law or under the Copyright Statutes—to the artist who creates the painting, or to the dealer to whom he consigns the painting for sale?
2. Is a dealer to whom a painting is consigned for sale at a stipulated price, and who is authorized to sell and does sell the painting for reproduction purposes, nevertheless entitled to retain the proceeds of the sale of the painting for reproduction purposes, without accounting for the same to his artist-principal?
3. May a dealer, to whom an artist consigns a painting for sale at a stipulated price, but who also has authority to sell the painting for reproduction, not only sell the painting

for reproduction for less than its stipulated price, but be under no obligation to report the sale to his artist-principal, or even to account to him for the proceeds?

4. Does a transaction whereby a dealer purports to sell a painting outright to a lithographer for \$300. to permit the latter to make reproductions of the painting, and then return the painting to the dealer as soon as reproduction is completed, and receive \$150. credit against other paintings to be delivered, constitute a sale of the painting for \$300. whereby title passed to the lithographer or constitute merely a sale of the reproduction rights (or copyright) for \$150.?

5. Does it make any difference as to the dealer's right to retain the proceeds of the sale of the painting for reproduction purposes, that the dealer thereafter buys the painting for himself, and pays the artist the stipulated purchase price therefor, less the dealer's commission?

6. Does the subsequent purchase of the painting by the dealer for himself under such circumstances operate retroactively to carry with it the reproduction rights previously sold, and entitle the dealer, rather than his artist principal, to the proceeds thereof?

The construction placed by the Court of Appeals on petitioner's letter of March 16, 1942 (Plf's Exh. 6, R. p. 175), as an *express authorization* to sell his paintings for reproduction in color prints, however unfounded, is of no moment here, and does not affect the legal questions here presented. Even if "expressly authorized" to sell the paintings for reproduction purposes, the legal questions raised by the case remain unanswered. The fact also remains that the "express authorization" was not acted upon and the painting was not sold pursuant to it. The painting was *authorized* to be sold for \$300, yet Findlay Galleries "sold" it to Goes for \$150 net, and W. C. Findlay, Jr. then found it expedient to buy the painting *directly* from petitioner!

The decision of the Court of Appeals throws into a complete state of confusion the question of ownership of the

reproduction rights to paintings (i.e., the copyright), both at common law, and under the Copyright Statutes. Do the reproduction rights and their proceeds belong to the artist who creates the painting, or to the dealer to whom the artist consigns the painting for sale? The Court's decision expressly holds that a dealer to whom an artist consigns a painting for sale at a stipulated price, but who also has authority to sell the painting for reproduction, may not only sell the painting for reproduction *for less than the stipulated price*, but is under no obligation to report the sale to his artist-principal, or even to account to him for the proceeds received! If the dealer then purchases the painting for himself, paying the artist the stipulated price therefor (less commission), he extinguishes all obligation to the artist! The Court's decision thus holds that a painting and its copyright are one and the same thing, and that the copyright to the painting and the proceeds thereof belong to the dealer-agent, if he subsequently buys the painting, and not to the artist-principal!

This astounding result was reached because the Court plainly did not understand the basic nature of copyright, or the right to reproduce, a painting or other work of art, that it is intangible property, but that it has value and that it exists and can be transferred, apart from the painting itself. The Court plainly regarded the painting and the right to reproduce it (i.e., the copyright) as one and the same thing—that possession or title to the painting necessarily carried the copyright with it, as the *Pushman Case* held. Believing this, the Court could see no wrong in defendants' acts, and it justified in the Court's mind ignoring the facts found by the District Court, and in accepting the version of the facts represented to the Court by Defendants' Brief, without critically examining to see if they were supported by the record herein. Because of this basic difficulty, the Court was unable to recognize the most obvious fraud, breach of trust, falsehood, and conspiracy by the dealer and lithographer

to cheat the artist of the reproduction rights to his paintings, when confronted with it. The Court was thus unable to detect the difference between the *form* of a sale of the painting, and the *substance* of a sale of the reproduction rights for one-half the cost of the painting! The Court thus has rendered a decision protecting two transparent wrongdoers against their innocent victim, allowed Findlay Galleries to unjustly enrich itself by \$150, with its obligation to petitioner "extinguished", and has precluded even an action, by amended complaint, or otherwise, by the artist for money had and received and unlawfully retained by his agent!

If the decision of the Court of Appeals stands, it will effectively destroy the property of artists in the reproduction rights or copyrights in their paintings, and render the artist utterly helpless against every unscrupulous dealer who would defraud him of those rights. The Court of Appeals has provided the formula. Whether or not the dealer is authorized to sell a painting for reproduction purposes, he need only go through the *form* of selling the painting outright to the reproducer at its stipulated price, allow the reproducer to return it when through with its reproduction, and give the reproducer a rebate or credit for the value of the painting in excess of its reproduction rights. The dealer then buys the painting for himself, and pays the artist therefore (less his commission). The dealer then owns the painting and can do with it as he pleases, and can even pocket the proceeds of what is in effect the sale of the reproduction rights, with complete immunity, and with all obligation "extinguished"—as the Court of Appeals has ruled. The artist is now completely at the mercy of the unscrupulous dealer, because of the inability of the Court of Appeals to recognize fraud, and to see through obvious sham and subterfuge, when face to face with it. As a precedent, the decision of the Court of Appeals utterly destroys the artist's property in his reproduction rights.

**REASONS RELIED ON FOR THE ALLOWANCE OF THE
WRIT.**

Your petitioners respectfully pray that the Writ be allowed for the following reasons:

1. Because the decision of the Circuit Court of Appeals is contrary to the fundamental principles of the common law as to copyrights, as established by the decisions of this Court in *Stephens v. Cady*, 14 How. 528 (1852); *Stevens v. Gladding*, 17 How. 447 at 453 (1854) and *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907), and of many other courts.

2. Because the decision of the Circuit Court of Appeals is contrary to the fundamental principles of Agency established in the common law and by the controlling decisions of the State Courts of Illinois.

3. Because the decision of the Court of Appeals has in effect extended the doctrine of *Pushman v. New York Graphic Society*, 287 N.Y. 302, 39 N.E. (2d) 249, (New York Court of Appeals 1942) to protect a defrauding dealer and lithographer, to whom the doctrine has no applicability, and is contrary to the settled principles of the law of Copyright and Agency.

4. Because the public interest in the protection of artistic property requires that the question as to ownership of reproduction rights in paintings and the proceeds thereof, as between artist, dealer and reproducer, be settled.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete Transcript of Record and of proceedings in the case numbered and entitled on its docket No. 8883, *Aiden Lassell Ripley, Plaintiff-Appellee v. Findlay Galleries, Inc.* a cor-

poration, and Goes Lithographing Company, a corporation, Defendants-Appellants, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray

AIDEN LASSELL RIPLEY, *Petitioner,*
by GEORGE P. DIKE,
CEDRIC W. PORTER,
Attorneys.

DIKE, CALVER & PORTER,
73 Tremont Street, Boston, Massachusetts.

October 7, 1946.

C. B. SPANGENBERG,
DAWSON, BOOTH & SPANGENBERG,
209 So. LaSalle Street, Chicago, Illinois.
Of Counsel for Petitioner.

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1946.

No. .

**AIDEN LASSELL RIPLEY, PETITIONER,
v.
FINDLAY GALLERIES, INC., A CORPORATION, AND GOES
LITHOGRAPHING COMPANY, A CORPORATION,
RESPONDENTS.**

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

**BRIEF FOR PETITIONERS
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.**

This petition is brought to review a decision of the Circuit Court of Appeals for the Seventh Circuit in an action to enjoin and recover damages for infringement of copyright in a painting, both at common law and under the Copyright Laws of the United States. The decision, written by Judge Briggles and reported in 155 F. (2d) 955 (R. p. 275) reversed the decision of the District Court holding the plaintiff's common law and statutory copyrights valid and infringed and dismissed the action.

A sufficient statement of the case, we believe, appears in the Petition under Summary and Short Statement of the Matter Involved.

JURISDICTION.

The date of the judgment to be reviewed is the date of the judgment of the Circuit Court of Appeals denying Petitioner's Petition for Rehearing, July 9, 1946 (R. p. 327). The Statute giving jurisdiction is Sec. 240a of the Judicial Code, Title 28, U.S.C. Sec. 347, as amended by the Act of February 13, 1925. Jurisdiction of the Court in diversity of citizenship cases is sustained in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937), and in statutory copyright cases in *Douglas v. Cunningham*, 294 U.S. 207 (1934).

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding in effect that the reproduction rights or copyright to a painting, and the proceeds thereof belong to the dealer-agent to whom the artist consigns the painting for sale.

2. The Circuit Court of Appeals erred in holding that a dealer to whom an artist consigns a painting for sale at a stipulated price, but who also has authority to sell the painting for reproduction purposes, may not only sell the painting for reproduction *for less than the stipulated price*, but is under no obligation to report the sale to his artist principal, or even to account to him for the proceeds received.

3. The Circuit Court of Appeals erred in holding that when a dealer authorized to sell a painting for reproduction purposes, purchases the painting for himself, paying the artist the stipulated price therefor (less his commission) that he thereby extinguishes all obligation to his artist-principal and may retain the proceeds derived from selling the painting for reproduction purposes at less than the stipulated price, which sale he did not report to his artist-principal.

4. The Circuit Court of Appeals erred in holding that the Findlay Galleries-Goes transaction constituted an outright

sale of the painting to the Goes Company for \$300. rather than a mere sale of the reproduction rights, when Goes had the right to return the painting when reproduction was completed and receive \$150 credit against other paintings to be delivered.

5. The Circuit Court of Appeals erred in holding that petitioner's letter of March 16, 1942 (Plf's. Exh. 6, R. p. 175) constituted an express authorization to sell any of his paintings for reproduction in color prints.

6. The Court of Appeals erred in not following the fundamental and established principles of the law of agency that an agent is a fiduciary to his principal, in determining the ownership of common and statutory law copyrights and the proceeds thereof between the artist-principal and his dealer-agent.

7. The Circuit Court of Appeals erred in not affirming the judgment of the District Court sustaining the validity and infringement of the Petitioner's Copyright, both at common law and under the Copyright Statutes.

ARGUMENT.

Point 1. The Decision of the Court of Appeals Is Contrary to the Fundamental Principle That An Artist at Common Law Possesses the Exclusive Right to Reproduce Any Work of Art He Creates, and the Right is Separate and Distinct from the Work of Art Itself. This Right Exists until the Work is Published with His Consent. Transfer of Title to or Possession of the Work Does Not Carry with it the Right to Reproduce Such Work, Unless Such Right is Clearly granted.

The fundamental fallacy of the decision of the Court of Appeals lies in regarding the painting and the right to reproduce it (i.e., the copyright) as one and the same thing, and that possession or title to the painting necessarily carries the copyright with it. This concept is wholly contrary

to the settled law, as stated by our highest courts from the earliest days of the recognition of copyright in the English common law, to the present.

The Copyright Act, Title 17, U.S.C. Sec. 41, expressly states:

“That the copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.”

In *Stephens v. Cady*, 14 How. 528, 55 U.S. 528 (1852), this Court pointed out the distinction in a copyright suit involving a map wherein the defendant justified the infringement because it had bought the engraved plate for the map in an execution against the copyright owner. The court held the defendant had not thereby acquired the copyright. Mr. Justice Nelson said (pp. 530-531):

“ . . . the property acquired by the sale in the engraved plate, and the copyright of the map secured to the author under the act of Congress, are altogether different and independent of each other, and have no necessary connection. The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence. It is an incorporeal right to print and publish the map, or, as said by Lord Mansfield in *Millar v. Taylor*, (4 Burr. 2396), ‘a property in notion, and has no corporeal tangible substance.’

“The engraved plate and the press are the mechanical instruments, or means by which the copies are multiplied, as the types and press are the instruments by

which the copies of a book are produced. And to say that the right to print and publish the copies, adheres to and passes with the means by which they are produced, would be saying, in effect, that the exclusive right to make any given work of art necessarily belonged to the person who happened to become the owner of the tools with which it was made; and that if the defendant in this case had purchased the stereotyped plates of a book, instead of the engraved plate, he would have been entitled to the copyright of the work, or at least, to the right to print, publish, and vend it; and yet, we suppose that the statement of any such pretension is so extravagant as to require no argument to refute it. *Even the transfer of the manuscript of a book will not, at common law, carry with it a right to print and publish the work, without the express consent of the author, as the property in the manuscript, and the right to multiply the copies, are two separate and distinct interests.* 4 Burr. 2330, 2396; 2 Eden, R. 329; 2 Atkyns, R. 342; 2 Story, R. 100.

“Lord Mansfield, observed, in *Millar v. Taylor*, that ‘no disposition, no transfer of paper upon which the composition is written, marked, or impressed (though it gives the power to print and publish), can be construed a conveyance of the copy (by which he means copyright, as appears from a previous part of his opinion), without the author’s express consent ‘to print and publish’, much less against his will’.

“ ‘Now, it seems to us, that the transfer of the manuscript of a book by the author would, of itself, furnish a much stronger argument for the inference of a conveyance of the right to multiply copies, than exists in the case of a transfer of the plate in question, or of the stereotype plates, as the ideas and sentiments, or in other words, the composition and substance of the work, is thereby transferred. *But the property in the copy-*

right is regarded as a different and distinct right, wholly detached from the manuscript, or any other physical existence, and will not pass with the manuscript unless included by express words in the transfer.' "

In *Stevens v. Gladding*, 17 How. 447, 58 U.S. 447 (1854), a copyright infringement suit involving the same map and facts as in the previous case, Mr. Justice Curtis said (p. 453):

"But the right in question is not parcel of the plate levied on, nor a right merely appendant or appurtenant thereto; but a distinct and independent property, subsisting in grant from the government of the United States, not annexed to any other thing, either by the act of its owner or by operation of law."

In *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907), this Court considered at length the distinction between the original painting, and the copyright, or right to reproduce it. Mr. Justice Day said (pp. 290-291, 293, 298-299):

"A copyright, as the term imports, involves the right of publication and reproduction of works of art or literature. A copyright, as defined by Bouvier's Law Dictionary, Rawles' edition, volume 1, p. 436, is: 'The exclusive privilege, secured according to certain legal forms, of printing, or otherwise multiplying, publishing and vending copies of certain literary or artistic productions.' And further, says the same author, 'the foundation of all rights of this description is the natural dominion which every one has over his own ideas, the enjoyment of which, although they are embodied in visible forms of characters, he may, if he chooses, confine to himself or impart to others'. That is, the law recognizes the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but

also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced. . . ."

"As we have seen, the purpose of the copyright law is not so much the protection of the possession and control of the visible thing, as to secure a monopoly having a limited time, of the right to publish the production which is the result of the inventor's thought."

"And a strong consideration in construing this statute has reference to the character of the property sought to be protected. It is not the physical thing created, but the right of printing, publishing, copying, etc., which is within the statutory protection." . . .

"While it is true that the property in copyright in this country is the creation of statute, the nature and character of the property grows out of the recognition of the separate ownership of the right of copying from that which inheres in the mere physical control of the thing itself, and the statute must be read in the light of the intention of Congress to protect this intangible right as a reward of the inventive genius that has produced the work. We think every consideration of the nature of the property and the things to be accomplished supports the conclusion that this statute means to give to the assigns of the original owner of the right to copyright an article the right to take out the copyright secured by the statute, independently of the ownership of the article itself."

In *Werckmeister v. American Lithographic Co.*, 134 F. 321 (CCA 2, 1904) the Court considered the distinction between the original painting and the copyright therein. Townsend, C.J. said (pp. 323-4):

"A copyright is an incorporeal right to print and publish. *Trustees v. Greenough*, 105 U.S. 527, 530, 26 L. Ed. 1157. It is a property in notion, without corpo-

real, tangible substance. *Millar v. Taylor*, 4 Burr. 2303. *This property is a different and independent right, detached from the corporeal property out of which it arises.* *Stephens v. Cady*, 14 How. 528, 14 L. Ed. 528. *Each of these is capable of existing and being owned and transferred independent of the other.* *Stevens v. Gladding*, 17 How. 447, 15 L. Ed. 155. The recognition of the doctrine of a distinctive literary property has existed from very early times. 2 Lewis' Blackstone, 407. The senate of the republic of Venice in 1469 granted to one John of Spira the exclusive privilege for five years of printing the letters of Cicero and Pliny. Two centuries Growth of American Law, 422. Blackstone considers this exclusive right of property as grounded on labor and invention and reducible to the head of occupancy. 2 Lewis' Blackstone, 405. The protection of the result may be considered as due to original acquisition."

To similar effect are:

Werckmeister v. American Lithographic Co., 142 Fed. 827 at 830-831 (CCSDNY 1905) (Affirmed 148 F. 1022, (CCA 2, 1906) without opinion).

Werckmeister v. Springer Lithographing Co., 63 F. 808 at 812 (CCSDNY 1894).

Millar v. Taylor, 4 Burr. 2303 at 2396 (King's Bench, 1769).

Donaldson v. Beckett, 4 Burr. 2408, (House of Lords, 1774).

Crowe v. Aiken, 6 Fed. Cas. 904 at 905-6, No. 3441 (C.C.N.D. Ill. 1870, Drummond, C.J.).

Buck v. Swanson, 33 F. Supp. 377 at 387 (D.C.D. Neb. 1939, 3 Judge court).

Ball—Law of Copyright and Literary Property, p. 26-28 (1944) and cases cited.

Point 2. The Decision of the Court of Appeals is also Contrary to the Simple Elementary and Fundamental Principles of Agency at Common Law and Under the Illinois Law, that an Agent is a Fiduciary Owing a Duty to Give His Principal Information Relating to Affairs Entrusted to Him and to Account for Profits Arising Out of His Employment.

The decision of the Court of Appeals is contrary to the elementary and fundamental principles of agency at common law and under the Illinois law.

Defendant Findlay Galleries has proved utterly faithless to its trust as a dealer. In Illinois, as elsewhere, an agent is a fiduciary as to matters within the scope of his agency.

In *Chicago Title & Trust Co. v. Schwartz*, 339 Ill. 184 at 193-4, 171 N.E. 169 (1930), Commissioner Edmunds said:

“The relation existing between a principal and agent for the sale of property is a fiduciary one, and the agent, in the exercise of good faith, is bound to keep his principal informed of all matters which come to his knowledge pertaining to the subject matter of the agency. (*Rieger v. Brandt*, 329 Ill. 21.) The rule is that the principal has a right to assume when he employs an agent, unless he is advised to the contrary, that the agent is in a situation to give to his principal that undivided allegiance and loyalty which the proper performance of the agency requires and that he will remain in that situation. If, without the knowledge and consent of his principal, the agent becomes the agent of the opposite party as well and undertakes by contract to bind his original principal, the law deems the original principal in that transaction to be practically unrepresented, and any bargain in his name or act done on his account is usually voidable at his option.”

See also:

Rieger v. Brandt, 329 Ill. 21 at 27-28, 160 N.E. 130 (1928).

Lerk v. McCabe, 349 Ill. 348, 182 N.E. 388 (1932).

Restatement of Agency, Sec. 13.

Under Illinois law also an agent in dealing with the principal on his own account in regard to a subject matter to which he is employed is subject to a duty to deal fairly with the principal and to communicate to him all material facts in connection with the transaction of which he has notice.

In *Johnson v. Bernard*, 323 Ill. 527, 154 N.E. 444 (1926) Mr. Justice Heard said:

"An agent for the sale of property is prohibited from having any interest, directly or indirectly, in the sale without the consent of his principal, after full knowledge of every fact known to the agent which might affect the principal's interest, and if a purchaser, knowing of the relation, enters into an agreement with the agent to buy land of the principal, ostensibly for himself but secretly for the agent, the principal, upon learning the facts, may rescind the sale and reclaim his land. *Tyler v. Sanborn*, 128 Ill. 136; *Glover v. Layton*, 145 id. 92; *Linn v. Clark*, 295 id. 22."

See also:

Rieger v. Brandt, 329 Ill. 21 at 27-28, 160 N.E. 130 (1928).

Linn v. Clark, 295 Ill. 22.

Lerk v. McCabe, 349 Ill. 348, 182 N.E. 388 (1932).

Restatement of Agency, Sec. 390.

Findlay Galleries failed entirely to inform Ripley of the transactions with Goes.

Under the Illinois law also, an agent who makes a profit in connection with transactions conducted by him on behalf of his principal is under duty to give such profit to the

principal. In *Stemm v. Gavin*, 255 Ill. 480 at 486, Judge Cartwright said (p. 486):

“Agents, and those acting in a fiduciary capacity, are held to the strictest fairness and integrity, and in equity an agent is disabled from dealing in the matter of the agency on his own account and will be compelled to transfer the benefit of his contract to his principal. Any personal benefit obtained by an agent in violation of his duty will be held to inure to the benefit of the principal, and if the agent makes any profit to himself by virtue of his position he must account therefor as for a trust. (*Dennis v. McCagg*, 32 Ill. 429; *Davis v. Hamlin*, 108 id. 39; *Salsbury v. Ware*, 183 id. 505.)”

See also:

Glover v. Layton, 145 Ill. 92 at 97, 34 N.E. 53 (1893).

Perry v. Engel, 296 Ill. 549 at 554, 130 N.E. 340 (1921).

Fox v. Simons, 251 Ill. 316 at 321-322, 96 N.E. 233 (1911).

Restatement of Agency, Sec. 388.

Findlay Galleries here failed to pay over the money (\$150 net) which it received from Goes for permitting the reproduction of the Ripley painting.

The Court of Appeals plainly overlooked these elementary and fundamental principles of Agency in holding that the dealer-agent was not required to report his dealings in his principal's property to his principal and could retain even the proceeds of his dealings with his principal's property. This situation is not affected by the alleged “express authorization” to sell petitioner's paintings for reproduction purposes in color prints. The dealer-agent was still bound to a duty to report his dealings and to account therefor to his principal.

Point 3. The Court's Decision Has In Effect Extended the Doctrine of *Pushman v. New York Graphic Society*, 287 N.Y. 302, 39 N.E. 2d. 249 (New York Court of Appeals 1942) to Protect a Faithless Dealer and Conspiring Lithographer, to Whom it Has no Applicability.

The *Pushman Case* was defendant's principal reliance in the District Court and Court of Appeals. In that case Pushman, an artist, consigned a painting for sale to the Grand Central Galleries in New York City, without specific reservation of rights to reproduce, and in due course the painting was sold to the University of Illinois, which hung the painting in its museum for some ten years. On solicitation by the New York Graphic Society, well known reproducers of prints, the University sold the right to reproduce the Pushman painting to the Society and lent the painting for this purpose. Pushman learned of the transaction and brought suit to enjoin reproduction of the painting. Judgment was for the defendant on the ground that by the unrestricted sale of his painting to the University without notice of reservation of rights to reproduce, Pushman had abandoned his rights to reproduce the painting in question. The painting there was not copyrighted under the Federal Statutes and the action was based on common law copyright.

The Court of Appeals herein, by holding that the Findlay-Goes transaction was an outright sale of petitioner's painting, and that W. C. Findlay Jr.'s purchase of the painting from Petitioner for himself "extinguished the obligation to plaintiff", has in effect extended the doctrine of the *Pushman Case* to the protection of a dealer-agent, and a lithographer in privity with him. The Court of Appeals' decision reached exactly the same result, and enables the dealer-agent to defraud his artist-principal of his reproduction rights.

In the *Pushman Case* the New York Court of Appeals re-

lied heavily on *Parton v. Prang*, 18 Fed. Cas. 1273, No. 10784, (CCD. Mass. 1872). The Court, however, failed to note that the doctrine for which it was cited was in effect overruled by this Court in *American Tobacco Company v. Werckmeister*, 207 U.S. 284 (1907), and also that the case arose long prior to the present Copyright Act of 1909 which changed the previous law and for the first time accorded copyright protection to certain *unpublished* works, including works of art.

The *Pushman Case*, and now the case at bar, are perpetuating a rule of law which no longer has any applicability, and the Court herein has even extended the rule to the protection of a defrauding dealer!

The situation, therefore, very urgently needs correction, and this fundamental conflict between the cases can only be resolved by this Court. The mistaken concept of the nature of copyright evidenced in the *Pushman Case*, has reached its *reductio ad absurdum*, in permitting an unscrupulous dealer and lithographer, conspiring with him to defraud an artist of the reproduction rights to his painting, and the proceeds thereof. When a mistaken concept as to the nature of copyright, that the painting and the copyright are regarded as one and the same thing, and that possession or title to the painting necessarily carries the copyright with it, reaches such an unjust and inequitable result, we respectfully submit that the situation requires the interposition of this Court.

CONCLUSION.

Copyright, or the artist's, author's or composer's property in the right to reproduce his own works, has been deemed worthy of protection for many hundreds of years in all civilized countries. The law has sought to protect the artist, author and composer against piracy of his works, and the courts have been astute to see through the schemes of all unscrupulous persons who have sought to defraud the artist, author and composer of his reproduction rights. The present case presents an instance of the most bare-faced and brazen pilfering of an artist's reproduction rights ever to come before any court, and one of the most ingenious schemes, that of purchase of the painting by the dealer himself after he had surreptitiously disposed of the reproduction rights in a sham "sale" of the painting for one-half its stipulated price, in an obvious attempt to bring himself within the rule of the *Pushman Case*, then recently decided. The Court of Appeals for the Seventh Circuit, apparently unfamiliar with the basic concepts of copyrights, and the business of dealing in reproduction rights in artist's paintings, accepted the righteous "explanations" of the defendants without critically examining to see if they were in fact supported by the record, and found the defendants had done no wrong. The result was that the scheme succeeded, the unscrupulous dealer was held entitled to retain the proceeds of the reproduction rights, his subsequent purchase of the painting had "extinguished his obligation". The decision is an open invitation to every other unscrupulous dealer to do the same thing—and leaves the artist completely at his mercy. The decision, unless reversed by this Court, effectively destroys the artist's property in his reproduction rights.

We respectfully submit that the decision of the Court of Appeals herein is in conflict with the settled and fundamental principles of copyright and of agency, and that the

questions involved are of such public importance that this Court should authoritatively determine them. We respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers that this question of ownership of the reproduction rights to paintings between artist, dealer, and reproducer may be made clear; and to that end, that a Writ of Certiorari be granted.

Respectfully submitted,

GEORGE P. DIKE,
CEDRIC W. PORTER,

Attorneys for Petitioner.

DIKE, CALVER & PORTER,

73 Tremont Street, Boston, Mass.

C. B. SPANGENBERG,

DAWSON, BOOTH & SPANGENBERG,

209 South LaSalle Street, Chicago, Illinois.

October 7, 1946.

Of Counsel for Petitioner.

Supreme Court, U. S.
FILED

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CHARLES ELMORE DRISLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No. 592

AIDEN LASSELL RIPLEY,

Petitioner,

vs.

FINDLAY GALLERIES, INC.,

A CORPORATION,

AND

GOES LITHOGRAPHING COMPANY,

A CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN ANSWER AND IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

✓ CHARLES B. CANNON,

(WALLACE AND CANNON)

1955—One North LaSalle Street,

Chicago 2, Illinois,

Attorneys for the Respondent,

Findlay Galleries, Inc.

✓ SAMUEL TOPLIFF,

(TOPLIFF AND HORWEEN)

105 South LaSalle Street,

Chicago 3, Illinois,

Attorneys for the Respondent,

Goes Lithographing Company.



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RESPONDENTS' BRIEF IN ANSWER AND IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

INTRODUCTORY STATEMENT.

The petition seeks to have this Court review a decision of the Court of Appeals for the Seventh Circuit (R. 275 to 280, inclusive), which was decided specifically and solely upon the particular facts in this case and without

any ruling upon or adoption or approval of any principle or proposition of law whatsoever. There is, therefore, no reason or ground for granting the writ sought.

The opinion of the Court of Appeals for the Seventh Circuit is reproduced in the record at pages 275 to 280, inclusive, and is reported in 155 F. (2) 955. To facilitate reference thereto the complete opinion of the Court of Appeals is reproduced in and as an "Appendix" to this brief. The oral opinion, Findings of Fact, Conclusions of Law and "Interlocutory Judgment" of the District Court appear in the record at pages 234 to 247, inclusive.

The petitioner (plaintiff below), Aiden Lassell Ripley, is an artist residing in Massachusetts. The respondent (defendant below), Findlay Galleries, Inc., is an Illinois corporation which conducts an art gallery at 338 South Michigan Avenue, Chicago, Illinois. The other respondent (defendant below), Goes Lithographing Company, is an Illinois corporation, and has a place of business located in Chicago, Illinois, where it is engaged in commercial lithography.

The case below was an action for alleged infringement by the respondents of both common law and statutory copyright claimed by the petitioner in a water color painted by him and entitled "Three Grouse in Snow" (Complaint, R. 2 to 7, inclusive). The case was tried in the United States District Court for the Northern District of Illinois, Eastern Division, at Chicago, before Judge Philip L. Sullivan, and arose over the allegedly unauthorized sale of the original water color or painting "Three Grouse in Snow" by the respondent, Findlay Galleries, Inc., to the respondent, Goes Lithographing Company, for reproduction by the latter company in copies for sale. The District Court held that this sale of the painting by Findlay to Goes for reproduction in copies

for sale was unauthorized and entered an "Interlocutory Judgment" (R. 246, 247) granting the petitioner-artist, Ripley, the relief sought in the complaint including an injunction against further reproduction and an accounting. Both respondents (defendants) thereupon took an appeal to the Court of Appeals for the Seventh Circuit which held that the sale of the painting by Findlay to Goes for reproduction in copies for sale was expressly authorized by the petitioner-artist, Ripley. For this reason the Court of Appeals in a unanimous decision (Opinion, R. 275 to 280, inclusive) reversed the judgment of the District Court and remanded the case to that Court for further proceedings consistent with the opinion of the Court of Appeals.

The petitioner-artist, Ripley, thereupon filed in the Court of Appeals a Petition for Rehearing (R. 283 to 304, inclusive) but this Petition for Rehearing was denied by the Court of Appeals (R. 327). The Mandate to the District Court thereupon issued (R. 327) and has not been stayed or recalled.

While, as pointed out above, this action was for alleged infringement of both common law and statutory copyright claimed by the petitioner-artist in the painting or water color "Three Grouse in Snow", the entire case below turned upon the issue of whether or not the respondent-defendant, Findlay Galleries, Inc., was authorized by the petitioner-artist, Ripley, as his agent, to sell the painting in suit to the respondent, Goes Lithographing Company, for reproduction by the latter company in copies for sale. This issue, as the Court of Appeals correctly held in its opinion, turned upon the agent's authority as solicited in a letter of March 14, 1942 (Plaintiff's Exhibit No. 5, R. 173) from the agent (the respondent, Findlay Galleries, Inc.) to the petitioner-artist, Ripley, requesting authorization to sell for reproduction one of the artist's paintings

then in the possession of the agent for sale, and a reply letter dated March 16, 1942 (Plaintiff's Exhibit No. 6, R. 175) from the petitioner-artist, Ripley, to his agent, the respondent, Findlay Galleries, Inc., granting the agent express authority to sell for reproduction one of the petitioner's paintings then in the possession of his agent for sale. Both of these letters are reproduced in full (R. 276) and are fully discussed in the opinion of the Court of Appeals (R. 275 to 280, inclusive). In so holding the Court of Appeals stated (last paragraph of Opinion, R. 279, 280):

"There being no substantial dispute in the evidence, we are constrained to hold that the lower court has placed an erroneous interpretation on the two letters in question. Holding as we do that the entire matter turns upon the authority to the agent and that the letters constitute complete authority to Findlay for the sale without reservation, it follows that if plaintiff had any common law copyright it passed under the sale and the subsequent application for a statutory copyright was made by plaintiff under a misconception of his rights and is invalid. Under the circumstances we think plaintiff's complaint is without merit."

In thus basing its decision solely upon the authority of the agent, Findlay, to sell the painting to Goes for reproduction in copies for sale, as authorized by the letters of March 14 and March 16, 1942 (Plaintiff's Exhibits Nos. 5 and 6, R. 173, 175) the Court of Appeals expressly stated that it was unnecessary for it to pass or rule upon other questions and points of law raised by the parties in the trial court and in their briefs on appeal. Thus the Court of Appeals stated in its opinion (R. 279):

"Neither do we need to consider the important case of *Pushman v. New York Graphic Society*, 39 N. E. (2) 249, 287 N. Y. 302, or the many other authorities on the question of whether in selling or authorizing the sale

of a picture without reservation the reproduction rights are included; or, conversely, whether the reproduction rights follow the sale unless expressly reserved by the artist. There are respectable authorities upon both sides of this much argued and briefed question, *but it becomes unimportant in our case, because of our holding of express authority for an unrestricted sale. Neither is the question of custom among artists important in our case for custom, whatever it be, must yield to express authority.*"

It will thus be seen that the decision of the Court of Appeals was based solely and entirely upon the facts of this case, and including the two letters of March 14 and March 16, 1942 (Plaintiff's Exhibits Nos. 5 and 6, R. 173, 175), and does not adopt, follow or approve any principle of copyright law, or of the law of agency, or of any other branch of the law. This being so, the only apparent reason why the petitioner is here seeking a review by this Court is that he is, of course, dissatisfied with the decision of the Court of Appeals.

In an attempt to obtain a review by this Court the petitioner now reargues the facts and the merits of his case which were fully and completely argued in his brief before the Court of Appeals, at oral argument in that Court, and in his petition for rehearing following the decision of the Court of Appeals. Having failed to impress the Court of Appeals with the merits of his case, the petitioner in his petition and in his brief in support thereof in this Court now attempts to read into the purely factual decision of the Court of Appeals numerous thin and transparent charges that in thus resting its decision solely and entirely upon the agent's authority to sell the painting in suit for reproduction, in copies for sale, as authorized by the two letters of March 14 and March 16, 1942 (Plaintiff's Exhibits Nos. 5 and 6, R. 173, 175) the Court of Appeals

fell into error both in the law of copyrights and in the law of agency as alleged in Paragraphs 1 to 3, inclusive, of page 14 of the Petition for Certiorari under the heading entitled "Reasons Relied On For The Allowance of the Writ." These charges are entirely without merit in view of the fact the Court of Appeals in its opinion specifically refrained from making any ruling whatsoever upon any principle or proposition of law, as pointed out in the foregoing quotation from the Court's opinion (R. 279).

Furthermore, the Court of Appeals in its opinion carefully reviewed all of the significant facts in this case and quoted in full the two controlling facts of the case on which it based its decision, namely, the two letters of March 14 and March 16, 1942 (Plaintiff's Exhibits Nos. 5 and 6, R. 173, 175) authorizing the petitioner's agent, the respondent, Findlay Galleries, Inc., to sell the painting in suit to the respondent, Goes Lithographing Company, for reproduction in copies for sale.

The only other and remaining reason or ground relied upon in support of the petition is that which is set forth in Paragraph 4 on page 14 of the petition under the heading "Reasons Relied on For the Allowance of the Writ." As this alleged ground for allowance of the writ the petitioner contends that this case is one of public interest and importance. However, this contention is entirely without merit because a case of less public interest and importance would seldom be brought to this Court's attention. This is for the reason that the conclusion of the Court of Appeals that the petitioner's agent, the respondent, Findlay Galleries, Inc., was authorized to sell the painting in suit to the respondent, Goes Lithographing Company, by the two letters of March 14 and March 16, 1942 (Plaintiff's Exhibits Nos. 5 and 6, R. 173, 175) is a purely factual matter which is of interest to the present litigants

only and is of no general public interest or importance, whatsoever.

It is apparent, therefore, that the four grounds recited in Paragraphs 1 to 4, inclusive, of page 14 of the petition, under the heading "Reasons Relied On For the Allowance of the Writ" fail to set forth any reason why this Court should review the purely factual decision of the Court of Appeals and grant the writ sought in and by the petition.

SUMMARY OF ARGUMENT.

I.

The case below was an action for alleged infringement of both common law and statutory copyright claimed by the petitioner-artist, Ripley, upon a painting or water color entitled "Three Grouse in Snow" the original of which was sold by the respondent, Findlay Galleries, Inc., as agent for the petitioner, to the respondent, Goes Lithographing Company, which reproduced the painting in copies for sale. The charge of infringement arose out of this sale and the reproduction and sale of copies of the painting. The Court of Appeals for the Seventh Circuit in its opinion (R. 275 to 280, inclusive) held that this sale of the painting by the respondent, Findlay Galleries, Inc., to the respondent, Goes Lithographing Company, and the reproduction and sale of copies thereof by the latter company, were fully authorized by the petitioner-artist, Ripley, by a letter of March 14, 1942 (Plaintiff's Exhibit No. 5, R. 173) from the agent, the respondent, Findlay Galleries, Inc., to its principal, the petitioner-artist, Ripley, requesting express authorization to sell for reproduction one of his paintings then in the possession of his agent for sale but unsold, and by a reply letter of March 16, 1942 (Plaintiff's Exhibit No. 6, R. 175) from the principal, the petitioner-artist, Ripley, granting the authority solicited by the agent to sell for reproduction one of his paintings then in the possession of his agent for sale but unsold.

II.

The decision of the Court of Appeals for the Seventh Circuit is based solely and entirely upon the specific facts which were involved in and are applicable solely and only to the case below and does not rule upon any principle or proposition of the law of copyrights or of the law of agency or of any other branch of the law. The first three grounds relied upon by the petitioner, as set forth in Paragraphs 1 to 3, inclusive, on page 14 of the petition, under the heading "Reasons Relied on For the Allowance of the Writ", are, therefore, without merit.

III.

Since the decision of the Court of Appeals (R. 275 to 280, inclusive) was based entirely upon the fact finding that the petitioner's agent, the respondent, Findlay Galleries, Inc., was authorized by the letters of March 14 and March 16, 1942 (Plaintiff's Exhibits Nos. 5 and 6, R. 173, 175) to sell the painting in suit to the respondent, Goes Lithographing Company, for reproduction in copies for sale, there is and can be no possible conflict whatsoever between the decision of the Court of Appeals and any decision of this Court or the decision of any lower federal court or any state court.

IV.

The Court of Appeals in its opinion (R. 275 to 280, inclusive, at page 279) specifically held that in view of the fact finding that the petitioner's agent, the respondent, Findlay Galleries, Inc., was authorized by the letters of March 14 and March 16, 1942 (Plaintiff's Exhibits Nos. 5 and 6, R. 173, 175) to sell the painting in suit to the respondent, Goes Lithographing Company, for reproduc-

tion in copies for sale it was unnecessary for the Court to rule upon, and the Court therefore declined to rule upon, any of the principles of the law of copyrights and of the law of agency which the parties had raised in their briefs before the Court of Appeals and which the Petitioner now seeks to have reviewed by this Court, in the abstract.

V.

The case below, having been decided upon specific facts which are peculiarly and specifically applicable solely and only thereto, and not to any other case, is one of purely private interest and is of no general public interest or importance whatever. The fourth and last ground relied upon in support of the petition, as set forth in Paragraph 4 on page 14 of the petition, under the heading "Reasons Relied On For the Allowance of the Writ", is, therefore, without merit.

VI.

Most of the petition and the brief in support thereof are concerned, not in establishing any reason or reasons why this court should grant the writ of certiorari prayed for, but in a reargument of the merits of the case below. It is not the purpose of the writ of certiorari here prayed for to give the petitioner, dissatisfied with the decision of the Court of Appeals below, another chance to reargue the merits of his case in this court.

POINTS AND AUTHORITIES.

I.

The decision of the Court of Appeals for the Seventh Circuit was a purely factual decision involving the authority of the petitioner's agent to sell the painting in suit for reproduction in copies for sale and contains no ruling upon any principle or proposition of law whatsoever. The petition, therefore, attempts to bring before this Court for review the purely factual matter of the authority of the petitioner's agent to sell the painting in suit for reproduction and hence is without merit. No reason, therefore, exists for the issuance of the writ of certiorari prayed for in the petition.

Caroline M. Forsyth v. City of Hammond, et al.,
166 U. S. 506, 514, 515, 41 L. Ed. 1095, 1098,
1099.

*General Talking Pictures Corporation v. Western
Electric Company, et al.*, 304 U. S. 175, 178, 82
L. Ed. 1273, 1275.

*Southern Power Co. v. North Carolina Public
Service Co.*, 263 U. S. 508, 509, 68 L. Ed. 413,
44 S. Ct. 164.

United States v. Johnston, 268 U. S. 220, 227, 69
L. Ed. 925, 926, 45 S. Ct. 496.

II.

There is and can be no possible conflict of decisions between or among the Court of Appeals for the Seventh Circuit and any other court as to the purely factual matter of the authority of the petitioner's agent to sell the painting in suit for reproduction in copies for sale since this

purely factual issue has never been and is not now involved in any other litigation. There is, therefore, no reason or ground for the issuance of the writ of certiorari prayed for in the petition.

Sec. 240a of the Judicial Code, as amended (U. S. C. A. Title 28, Sec. 347).

Rule 38, Par. 5, Secs. a, b and c of the Rules of the Supreme Court of the United States, as amended, May 26, 1941.

Caroline M. Forsyth v. City of Hammond, et al.,
166 U. S. 506, 514, 515, 41 L. Ed. 1095, 1098, 1099.

III.

The authority of the petitioner's agent to sell the painting in suit for reproduction in copies for sale is a matter of purely private interest to the parties to the present case and in no way decides or affects any principle or proposition of the law of copyrights or of the law of agency. Hence the present case is of purely private interest to the parties hereto and is of no general or public importance, whatsoever.

Rule 38, Par. 5, Secs. a, b and c of the Rules of the Supreme Court of the United States, as amended, May 26, 1941.

Caroline M. Forsyth v. City of Hammond, et al.,
166 U. S. 506, 514, 515, 41 L. Ed. 1095, 1098,
1099.

Layne and Bowler Corporation v. Western Well Works, Inc., et al., 261 U. S. 387, 393, 67 L. Ed. 712, 714.

ARGUMENT.

I.

The action below was an action for alleged infringement by the respondents of the petitioner's claimed so-called common law rights in, and of a statutory copyright claimed by the petitioner upon, a painting or so-called water color of his own creation entitled "Three Grouse in Snow."

The petitioner, Aiden Lassell Ripley, is an artist residing in Massachusetts. The respondent, Findlay Galleries, Inc., is an Illinois corporation and conducts an art gallery at 338 South Michigan Avenue, Chicago, Illinois. The respondent, Goes Lithographing Company, is also an Illinois corporation, and has a place of business located at 42 West 61st Street, Chicago, Illinois, where it is engaged in commercial lithography.

An "Interlocutory Judgment" entered by the District Judge on June 1, 1945 (R. 246, 247) granted the petitioner an injunction and awarded him an accounting in an action for the alleged infringement of copyright on his painting or so-called water color entitled "Three Grouse in Snow." A reproduction of this water color appears in the record at page 7.

On January 26, 1942 the original water color "Three Grouse in Snow" was consigned and shipped by the petitioner, Ripley, to his agent, the respondent, Findlay Galleries, Inc., for sale, along with ten other pictures. The selling price of the painting to the purchaser was agreed upon as three hundred dollars (\$300.00) of which the respondent-agent, Findlay Galleries, Inc., was to retain one third or one hundred dollars (\$100.00) as its commission

for selling the painting. The balance of two hundred dollars (\$200.00) was to be remitted to the petitioner-artist, Ripley (Finding of Fact No. 6, R. 236). This sum of two hundred dollars (\$200.00) was paid to the petitioner-artist, Ripley, by Walstein C. Findlay, Jr., president of the respondent corporation, Findlay Galleries, Inc. (Findings of Fact Nos. 24 and 25, R. 240, 241), and cancelled checks (Plaintiff's Exhibits Nos. 23, 25, 26 and 27, R. 201, 205). It has been retained by the petitioner at all times since then.

Nothing was stated by the petitioner-artist, Ripley, at the time of consignment or delivery of the painting to his agent, the respondent, Findlay Galleries, Inc., in writing or otherwise, as to the reproduction rights in the painting (Finding of Fact No. 7, R. 236, 237).

The painting did not attract a purchaser who might wish to hang it in his home. The respondent, Findlay Galleries, Inc., thereupon wrote the petitioner-artist on March 14, 1942 (Plaintiff's Exhibit No. 5, R. 173) advising that it had been unable to find a purchaser for the painting and inquiring as to whether or not the petitioner-artist, Ripley, would be interested in selling any of his paintings or water colors for commercial reproduction. The petitioner replied that he had no objection to selling one of his paintings or water colors for reproduction. (Letter of March 16, 1942, Plaintiff's Exhibit No. 6, R. 175.)

Thereafter, namely, on or about April 6, 1942, the respondent, Findlay Galleries, Inc., sold the painting in suit, without reservation, to the respondent, Goes Lithographing Company, which made and sold a large number of lithographic reproductions of the painting.

The controversy below arose out of this sale of the painting or water color "Three Grouse in Snow" by the respondent, Findlay Galleries, Inc., to the respondent, Goes

Lithographing Company, and the subsequent making and selling of reproductions of the water color by the respondent, Goes Lithographing Company. The petitioner contended that this sale of the painting to, and its reproduction by, the respondent, Goes Lithographing Company, were unauthorized, whereas both respondents contended in the trial court and in the Court of Appeals that this sale of the painting and its reproduction were fully authorized by the petitioner. The District Judge held for the petitioner-artist (plaintiff), namely, that this sale of the painting in suit and its reproduction were unauthorized. However, the Court of Appeals reversed the District Judge and held in its opinion (R. 275 to 280) that this sale of the painting and its reproduction were fully authorized by the petitioner-artist, Ripley, by the letters of March 14 and March 16, 1942 (Plaintiff's Exhibit Nos. 5 and 6, R. 173, 175).

In so holding and in reversing the District Judge, the Court of Appeals stated as follows in its opinion (Last Paragraph of Opinion, R. 279, 280):

"There being no substantial dispute in the evidence, we are constrained to hold that the lower court has placed an erroneous interpretation on the two letters in question. Holding as we do that the entire matter turns upon the authority to the agent and that the letters constitute complete authority to Findlay for the sale without reservation, it follows that if plaintiff had any common law copyright it passed under the sale and the subsequent application for a statutory copyright was made by plaintiff under a misconception of his rights and is invalid. Under the circumstances, we think plaintiff's complaint is without merit."

Approximately a year and six months after the painting in suit had been sold by the respondent, Findlay Galleries, Inc., and after a large number of reproductions of the

painting in suit had been made and sold by the respondent, Goes Lithographing Company, the petitioner-artist, Ripley, on or about September 25, 1943, filed in the office of the Register of Copyrights an application to register a claim to a statutory copyright on the painting in suit as an alleged "unpublished work of art" and a certificate of registration was issued thereon in due course (Plaintiff's Exhibit No. 39, R. 217).

The complaint charged infringement by both respondents of the petitioner's asserted common law rights in the water color "Three Grouse in Snow" as well as infringement of the petitioner's claimed statutory copyright on this water color as an alleged unpublished work of art. However, as stated in the foregoing quotation from its opinion, the Court of Appeals held (R. 280) that

"* * * if plaintiff had any common law copyright it passed under the sale and the subsequent application for a statutory copyright was made by plaintiff under a misconception of his rights and is invalid".

II.

The decision of the Court of Appeals for the Seventh Circuit is based solely and entirely upon the specific facts which were involved in the action below and the Court's opinion does not rule upon or approve or follow any principle or proposition of the law of copyrights or of the law of agency, or any other branch of the law. Thus it will be seen that the decision of the Court of Appeals was based solely and entirely upon the purely factual point of an agent's authority to sell a chattel, namely, the painting in suit, for reproduction. This is a purely factual matter and affords nothing for this Court to review.

The first three reasons relied upon by the petitioner in support of the petition, and as set forth in Paragraphs 1

to 3, inclusive, on page 14 of the petition, under the heading "Reasons Relied on For the Allowance of the Writ", are, therefore, without merit. This is because these reasons allege errors of law in the opinion of the Court of Appeals which do not exist therein and can not possibly exist therein because the purely factual decision of the Court of Appeals is entirely devoid of any ruling upon any principle of law, whatsoever.

It is well established that under circumstances such as are presented by the facts of the action below no ground exists for the allowance of the writ. Thus, in the case of *Caroline M. Forsyth v. City of Hammond, et al.*, 166 U. S. 506 (41 L. Ed. 1095, 1098, 1099) this Court in reiterating a policy with respect to granting certiorari, even then long established, said, at pages 514 and 515:

"* * * it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

In the case of *General Talking Pictures Corporation v. Western Electric Company, et al.*, 304 U. S. 175, 82 L. Ed. 1273, this Court stated as follows at page 178 (1275):

"There is nothing in the lower courts' decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164; *United States v. Johnston*, 268 U. S. 220, 227, 69 L. Ed. 925, 926, 45 S. Ct. 496."

Similarly, in the case of *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164, this Court stated at page 509:

"This writ must be dismissed. The petition therefor stated that the cause involved a grave question of vital importance to the public, and alleged as special reason for its re-examination that the decree would deprive petitioner of property without due process of law, and of freedom to contract, contrary to the Federal Constitution. The opinion below is reported in 33 A. L. R. 626, 282 Fed. 837.

"The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use,—*primarily a question of fact. That is not the ground upon which we granted the petition*, and, if sufficiently developed, would not have moved us thereto."

III.

The purely factual issue of the agent's authority to sell the painting in suit for reproduction in copies for sale has never been, and is not now, involved in any other litigation among the parties. Hence there has never been and is not now any conflict of authority between the decision of the Court of Appeals for the Seventh Circuit and the decision of any other lower federal court or any state court which would justify review of the facts of this case by this Court. This is particularly true in view of the fact that the Court of Appeals in its opinion expressly held that since its decision was based entirely upon the petitioner's authorization to his agent to sell the painting in suit for reproduction, as evidenced by the two letters of March 14 and March 16, 1942 (Plaintiff's Exhibits Nos. 5 and 6, R. 173, 175) it was unnecessary for the Court to review or pass upon any of the points of law raised by the parties in the trial court and in the Court of Appeals.

Thus the Court of Appeals in its opinion stated as follows (R. 279):

"Neither do we need to consider the important case of *Pushman v. New York Graphic Society*, 39 N. E. (2) 249, 287 N. Y. 302, or the many other authorities on the question of whether in selling or authorizing the sale of a picture without reservation the reproduction rights are included; or, conversely, whether the reproduction rights follow the sale unless expressly reserved by the artist. There are respectable authorities upon both sides of this much argued and briefed question, but it becomes unimportant in our case, because of our holding of express authority for an unrestricted sale. Neither is the question of custom among artists important in our case for custom, whatever it be, must yield to express authority."

Under these circumstances it has long been the law in this Court that the petition presents no basis or ground for the allowance of the writ prayed for.

Sec. 240a of the Judicial Code, as amended, U. S. C. A. Title 28, Sec. 347; Rule 38, Par. 5, Secs. a, b and c of the Rules of the Supreme Court of the United States, as amended, May 26, 1941; *Caroline M. Forsyth v. City of Hammond, et al.*, 166 U. S. 506, 514, 515, 41 L. Ed. 1095, 1098, 1099; *Layne and Bowler Corporation v. Western Well Works, Inc., et al.*, 261 U. S. 387, 393, 67 L. Ed. 712, 714.

IV.

The action below was decided by the Court of Appeals for the Seventh Circuit upon a matter of purely private interest to the litigants, namely, the agent's authority to sell the painting in suit for reproduction in copies for sale. This is a matter of purely private interest to the parties to the present litigation and in no way affects or disturbs the existing law of copyrights or the existing law of agency

and is of no general or public interest or importance whatsoever.

The fourth and last ground relied upon by the petitioner in support of the petition, as set forth in Paragraph 4 on page 14 of the petition, under the heading "Reasons Relied on For the Allowance of the Writ", is without merit. This is so because the "reason" referred to attempts to impart to the action below the dignity of great public interest and importance which is entirely absent in fact.

It has long been held that under these circumstances this Court will not grant the writ of certiorari prayed for by the petitioner.

Thus, in the case of *Layne and Bowler Corporation v. Western Well Works, Inc., et al.*, 261 U. S. 387, 67 L. Ed. 712, 714, this Court said, at page 393:

"* * * it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of *importance to the public as distinguished from that of the parties*, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

(Also Rule 38, Par. 5, Secs. a, b and c of the Rules of the Supreme Court of the United States, as amended, May 26, 1941; and *Caroline M. Forsyth v. City of Hammond, et al.*, 166 U. S. 506, 514, 515, 41 L. Ed. 1095, 1098, 1099.)

V.

Most of the petition and the brief in support thereof are devoted to a reargument of the petitioner's case which was thoroughly briefed and argued by petitioner's counsel in the Court of Appeals. It is not the purpose of the writ of certiorari here prayed for to give the petitioner, dissatisfied with the decision of the Court of Appeals below, another chance to reargue the merits of his case in this Court. This is a principle so fundamental and so long established in this Court that it no longer requires the citation of authority to support it.

It is, therefore, deemed unnecessary to answer herein the numerous arguments advanced by the petitioner in his petition and brief as to the alleged merits of his action.

Conclusion.

For the reasons stated, and under the authorities cited, it is submitted that:

(1) The purely factual decision of the Court of Appeals (containing no ruling upon any principle or proposition of the law of copyrights or of the law of agency, or of any other branch of the law, and applicable only to the specific facts of this case) was, and should be, final;

(2) The petition fails to establish any reason why this Court should grant the writ of certiorari for which the petitioner prays and review this case merely because the petitioner is dissatisfied with the decision of the Court of Appeals;

(3) The four reasons relied upon by the petitioner in support of the petition, as recited in Paragraphs 1 to 4, inclusive, on page 14 of the petition, under the heading

“Reasons Relied on For Allowance of the Writ”, are without merit; and

(4) The petition should, therefore, be denied.

Respectfully submitted,

CHARLES B. CANNON,
(WALLACE AND CANNON)
1955—One North LaSalle Street,
Chicago 2, Illinois,
*Attorneys for the Respondent,
Findlay Galleries, Inc.*

SAMUEL TOPLIFF,
(TOPLIFF AND HORWEEN)
105 South LaSalle Street,
Chicago 3, Illinois,
*Attorneys for the Respondent,
Goes Lithographing Com-
pany.*

Dated: October 24, 1946.

(All Italics Added.)

APPENDIX.

IN THE UNITED STATES CIRCUIT COURT OF ^F APPEALS,
For the Seventh Circuit.

No. 8883. OCTOBER TERM, 1945, APRIL^F SESSION, 1946.

<p>AIDEN LASSELL RIPLEY, <i>Plaintiff-Appellee,</i> <i>vs.</i> FINDLAY GALLERIES, INC., and GOES LITHOGRAPHING COMPANY, <i>Defendants-Appellants.</i></p>	}	<p>Appeal from the Dis- trict Court of the United States for the Northern Dis- trict of Illinois, Eastern Division.</p>
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June 11, 1946.

Before SPARKS and MAJOR, *Circuit Judges*, and BRIGGLE,
District Judge.

BRIGGLE, *District Judge*. Appellants challenge the propriety of a judgment of the District Court holding that they had unlawfully brought about the reproduction of one of appellee's paintings and requiring appellants to account to appellee for gains and profits.

Appellee (plaintiff below) is an artist residing in the state of Massachusetts. Appellant, Findlay Galleries, Inc. (one of the defendants below), is an Illinois corporation engaged in conducting an art gallery. Goes Lithographing Company (one of the defendants below) is an Illinois cor-

poration engaged in commercial lithography. The parties will hereinafter be referred to as plaintiff and defendants, as they appeared in the trial court. Jurisdiction is conceded.

In January, 1942, plaintiff consigned to defendant Findlay, as his agent, 11 of his productions for the purpose of exhibition and sale, including among them a water color entitled "Three Grouse in Snow," which painting is the only one involved in this proceeding. The price fixed for the sale of this painting was \$300.00 with \$100.00 to be retained by Findlay as its commission. Findlay exhibited the various paintings and offered them for sale, but apparently without success. On March 14, 1942, it wrote plaintiff a letter¹ advising that it had not been able to make any sales of the paintings and inquiring if plaintiff would be interested in having it sell any of his watercolors for re-

1 "Mr. A. Lassell Ripley
52 Totten Road
Lexington, Mass.

March 14, 1942

Dear Mr. Ripley:

We recently hung an interesting watercolor show, which included some of your work, and while we had a great many people come in I am sorry to say we made no sales of your paintings.

However, we have a client who is an important lithographer, who for the last few years has done the calendars for the *Milwaukee Journal*. He was very much interested in your work, and inasmuch as this year they are going to use a calendar of this type of subject he suggested that we write you to see if it would be agreeable to use any of your watercolors or etchings, or even he might want you to do something especially for them.

This calendar is really a very artistic thing, and is known throughout the newspaper world as one of the finest works of art of its kind, and very little advertising copy is used with it. Last year, for instance, they had Dale Nichols do something for them, and each year they have had top-notch American artists.

We are writing to see if you might be interested in having us sell any of your watercolors for reproductions. Would appreciate an answer by return Air Mail if possible so that we might contact our customer promptly.

We are looking forward to doing some business for you, and certainly enjoy and appreciate having your work.

Very truly yours,

FINDLAY GALLERIES, INC.
EDWIN W. PRIESTLEY"

productions. On March 16, 1942, plaintiff replied² that he had no objection to selling one of his pictures for reproduction. On or about April 6, 1942, defendant Findlay sold the painting in question, without reservation to defendant Goes, and Goes proceeded to and did reproduce and sell the same commercially. Plaintiff asserts that this sale of the painting to Goes and its reproduction were unauthorized and after learning of its reproduction he filed on or about September 25, 1943, an application for registration of the painting in the office of the register of copyrights and received a certificate of registration therefor. Plaintiff asserts that the conduct of both defendants was an infringement of his common law copyright in the painting as well as his statutory copyright. It is to be noted that his statutory copyright was obtained long after the sale to and reproduction by Goes, but plaintiff's position in this respect is bottomed upon the assertion that such sale and reproduction were unauthorized and, therefore, wrongful. The painting was sold to Goes for the sum of \$300.00 with a further condition that Findlay would for itself repurchase the painting upon request by Goes and give him credit on other paintings for the sum of \$150.00. Goes paid Findlay the sum of \$300.00 and later returned the painting to Findlay and received \$150.00 credit upon the purchase of other paintings. Findlay did not at once remit to plaintiff the \$200.00 that was due him on the sale, but later, upon inquiry by plaintiff, offered to buy for itself from plaintiff the painting in question at the price of

2

52 Follen Road
Lexington, Mass.

"Dear Mr. Priestley :

I have no objection to selling one of my pictures for reproduction especially if it is well reproduced. As you mentioned that your client inquired about etchings as well as water colors I assume that he was interested in my sporting things. In regard to using an etching, I shouldn't think it would not be worth while to sell a single print for that purpose. I would rather sell your client a water color and if he would rather have me do something especially for him I think I could do it. In this case I should ask a slightly higher price.

My address should be Follen Road instead of Totten.

Thanks for writing to me.

Sincerely yours,

March 16, 1942

AIDEN LASSELL RIPLEY"

\$200.00, the net price to the artist, and did later pay plaintiff \$200.00. Defendant Findlay explains its failure to promptly remit to the artist upon payment by Goes and its later rather unusual correspondence with the plaintiff in reference to the purchase of the painting long after it had in fact been sold to Goes, by the fact that one of its employees, Priestly by name, had consummated the sale to Goes and had later, during an extended absence from his Chicago office of Mr. Findlay, the president of Findlay Galleries, Inc., absconded with a large sum of money, apparently including the \$300.00 received from Goes. Mr. Findlay asserts that he was not fully aware of the arrangement concerning the painting in question or its exact whereabouts at the time of plaintiff's inquiry and at the time of the correspondence relative to its purchase by defendant Findlay.

Defendants contend that the sale by Findlay to Goes was fully authorized by plaintiff's letter of March 16th, 1942, and that the same was properly sold to and reproduced by Goes, and that the application of plaintiff for a statutory copyright after such sale and reproduction was improper and invalid.

Whether the sale, on April 6, 1942, was authorized, and if authorized just what it conveyed to Goes is to be determined by the construction to be placed upon Findlay's letter of March 14, 1942, and plaintiff's reply thereto of March 16, 1942, when considered in the light of the previous arrangement between the parties. It is to be remembered that before the exchange of these letters plaintiff had consigned the painting in question to Findlay and made Findlay his agent for the purpose of sale at the stipulated sum of \$300.00 without express reservation of any kind or character. Then in March after an unsuccessful effort to sell the paintings, the agent inquired of the artist whether he would be interested in selling any of his water colors for reproduction. While the letter of inquiry refers also to a lithographer who had been doing reproductions for calendars for the *Milwaukee Journal*, yet we think a fair construction to be placed on the letter is not one limited to the inquiry of whether he would be

willing to have his paintings reproduced for the *Milwaukee Journal*, but rather one of general inquiry of whether the agent Findlay would be authorized to sell any of his water colors for reproduction generally. Plaintiff's reply two days later saying that "I have no objection to selling one of my pictures for reproduction, especially if it is well reproduced," is well nigh unlimited in its authority to the agent, there being no contention that it was not "well reproduced." The authority to sell had already been vested in the agent several months previously, and even though it may have already possessed sufficient authority to sell for reproduction, as now contended, yet the inquiry of March 14th may in any event be treated as a courteous inquiry of plaintiff for clarification of the scope of the agent's authority. With the authority already concededly vested in the agent for sale for all purposes except reproduction, plaintiff by his letter of March 16th removes this supposed reservation by most explicit language. It, therefore, seems inescapable that the proper construction to be placed upon these two letters is that Findlay was authorized by plaintiff to sell any of the paintings theretofore consigned even to one who desired to reproduce same and to pass complete title thereto without reservation.

If this be the proper construction to be placed upon the two letters, then the sale to Goes being fully authorized, title to the painting passed and reproduction by Goes was entirely proper. That title to the painting again passed at a later date to Findlay under its contract with Goes is unimportant. The subsequent maneuvering of Mr. Findlay when confronted with a more or less embarrassing situation in his own business by virtue of the misconduct of his employee, followed by his arrangement to purchase the painting from plaintiff for \$200.00 is, likewise, without special significance as Findlay, Inc., at that time owned the painting by virtue of its repurchase from defendant Goes. Findlay was indebted to plaintiff in the sum of \$200.00, but nothing more than a debtor-creditor relation existed between them at that time, insofar as "Three Grouse in Snow" is concerned. Neither do we need to con-

sider the important case of *Pushman v. New York Graphic Society*, 39 N. E. (2) 249, 287 N. Y. 302, or the many other authorities on the question of whether in selling or authorizing the sale of a picture without reservation the reproduction rights are included; or, conversely, whether the reproduction rights follow the sale unless expressly reserved by the artist. There are respectable authorities upon both sides of this much argued and briefed question, but it becomes unimportant in our case, because of our holding of express authority for an unrestricted sale. Neither is the question of custom among artists important in our case for custom, whatever it be, must yield to express authority. Whether Findlay was morally excused by reason of his misinformation or lack of information in his apparent deception of the plaintiff after the sale had been made to Goes is not now material. If title passed as we believe then only an obligation remained for Findlay to remit to plaintiff the sum of \$200.00, the net proceeds of the sale. When Findlay did subsequently pay the sum of \$200.00 to plaintiff although supposedly on another basis this extinguished the obligation to plaintiff.

There being no substantial dispute in the evidence, we are constrained to hold that the lower court has placed an erroneous interpretation on the two letters in question. Holding as we do that the entire matter turns upon the authority to the agent and that the letters constitute complete authority to Findlay for the sale without reservation, it follows that if plaintiff had any common law copyright it passed under the sale and the subsequent application for a statutory copyright was made by plaintiff under a misconception of his rights and is invalid. Under the circumstances, we think plaintiff's complaint is without merit. No affirmative relief is deemed necessary under the cross complaint. The judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

REVERSED AND REMANDED.